

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-5028/31

To be argued by
Michael T. Harren

In The

United States Court of Appeals

For the Second Circuit

In re

THE DUPLAN CORPORATION, DUPLAN FABRICS, INC.,
Debtors.

CHEMICAL BANK, THE FIRST NATIONAL BANK OF
CHICAGO, NORTH CAROLINA NATIONAL BANK AND
SECURITY PACIFIC NATIONAL BANK,

Appellants,

UNITED STATES TRUST COMPANY OF NEW YORK, Suc-
cessor Indenture Trustee for the 5½% Convertible Subordinated
Debentures of THE DUPLAN CORPORATION, due February 1,
1994,

Appellant.

THE ROCHESTER JOINT BOARD AMALGAMATED
CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO.

Appellee.

ALFRED P. SLANER, REORGANIZATION TRUSTEE,

On Appeal From The United States District Court For The
Southern District Of New York

BRIEF OF APPELLEE ROCHESTER JOINT BOARD,
AMALGAMATED CLOTHING and TEXTILE WORKERS
UNION, AFL-CIO

CHAMBERLAIN, D'AMANDA, BAUMAN,
CHATMAN & OPPENHEIMER

*Attorneys for the Rochester Joint Board, Amalgamated
Clothing and Textile Workers Union, AFL-CIO*

1100 Crossroads Office Building
2 State Street
Rochester, New York 14614
(716) 232-3730

Michael T. Harren
Of Counsel

Daily Record Corporation
Rochester, New York (3533)



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Syracuse, New York

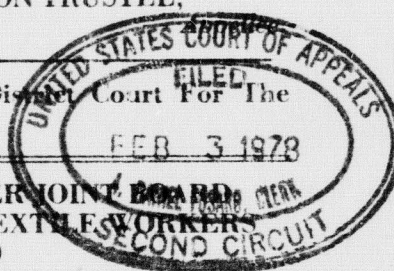


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**BRIEF OF APPELLEE ROCHESTER JOINT BOARD,
AMALGAMATED CLOTHING and TEXTILE WORKERS
UNION, AFL-CIO**

Preliminary Statement

This brief is filed in response to briefs filed by appellant United States Trust Company of New York, successor Indenture Trustee (the "Indenture Trustee") and appellants Chemical Bank, The First National Bank of Chicago, North

Carolina National Bank and Security Pacific National Bank (the "Secured Bank Lenders"). The above appellants appeal from so much of an Order by the Honorable Kevin T. Duffy, United States District Judge for the Southern District of New York, dated October 5, 1977 and entered by the Clerk of the Court on October 12, 1977, (A 136-137) authorizing appellee Alfred P. Slaner, Reorganization Trustee (the "Reorganization Trustee") to enter into a collective bargaining agreement which had been previously negotiated between the Reorganization Trustee and the appellee Rochester Joint Board, Amalgamated Clothing and Textile Workers Union, AFL-CIO (the "Union").

The facts are not in dispute and have been set out at length in the brief of the Indenture Trustee (at pp. 4-10). The appellee will not repeat the facts here.

Counter Statement of Issues Presented

(1) Whether, in light of the Reorganization Trustee's obligation to negotiate in good faith on the issue of severance pay, the District Court properly authorized the Reorganization Trustee to sign the contract negotiated with the Union?

(2) Whether the appellants presented any genuine issues of material facts requiring an evidentiary hearing by the District Court?

POINT I

The District Court properly recognized the Reorganization Trustee's obligation to bargain in good faith with the Union and correctly authorized the contract which resulted from arm's length negotiations between the Union and the Trustee.

Although the briefs of the appellants tend to limit the scope of this appeal to the argument had before the District Court on September 27, 1977, the issues raised on this appeal must be decided in consideration of the Reorganization Trustee's obligations in the field of labor relations. The contract presented to the District Court for approval was not a gratuitous offer of a magnanimous employer. The contract presented was the result of months of bargaining between an employer and a union which have maintained a collective bargaining relationship for more than forty years.

Prior to the commencement of the proceedings in bankruptcy, the employer had in effect two collective bargaining agreements with the appellee Rochester Joint Board Amalgamated Clothing and Textile Workers Union, AFL-CIO. One contract covered those employees of Rochester Button Co. within the collective bargaining units at the Company's plants in Rochester and Wellsville, New York (A 48-64). The second contract covered employees represented by the Union at the Company's Akron, New York plant (A 34-47). Each of the contracts expired on June 1, 1977 (A 41, 56).

Faced with the expiration of these contracts, the Reorganization Trustee, his counsel, the management of Rochester Button and the Union commenced negotiations for successor contracts (A 28). The Reorganization Trustee is required to negotiate with the representative of the debtor's employees concerning wages, hours and conditions of employment. The Bankruptcy Act does not grant the

Reorganization Trustee any exemption from the statutory responsibilities of an employer in interstate commerce. As noted in connection with unfair labor practices committed in the early years following the enactment of the Wagner Act:

Even though some of the unfair labor practices with which the respondent is charged were committed while it was managing and operating its business and properties as the debtor in possession under court order, it will hardly be denied that a debtor in possession is responsible for the unfair labor practices which occur during a reorganization. Its status as an employer is no different, so far as the National Labor Relations Act, 29, U.S.C.A. §151 et seq., is concerned, than that of any other employer. Court supervision of corporate reorganization affords the operating possessor no freedom from its statutory duty to its employees. . . . (footnote omitted) *NLRB v. Baldwin Locomotive Works*, 128 F.2d 39, 43 (3d Cir. 1942)

While the Reorganization Trustee is not the same entity as the pre-bankruptcy company, the new entity nonetheless must comply with the Labor Act. *Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc.*, 519 F.2d 698, 704 (2d Cir. 1975), 29 U.S.C. §152 (1).

The Reorganization Trustee's obligation to negotiate with the Union also included the obligation to negotiate the continuation of the severance pay provisions contained in the then-current contracts. Severance pay is a mandatory subject of collective bargaining which either side may insist on to the point of impasse and over which the Union could strike. *Continental Insurance Co.*, 204 NLRB 1013 (1973), enforced 495 F.2d 44 (2d Cir. 1974).

The Reorganization Trustee did enter into a collective bargaining agreement with Union which carried forward the provisions of the prior agreements and modified, to some

degree, eleven of the thirty-two articles of the prior agreements (A 65-85). The new contract applied to each of the three plants represented by the Union.

The agreement was submitted to the District Court by the parties with the clear understanding that it would be subject only to approval or rejection in toto (A 97-98). The Union could not accept a situation where other parties to the bankruptcy proceeding could reopen discussions on issues settled at the bargaining table.

The appellants object to only one paragraph in the entire contract. As is apparent from the Counter Order proposed by counsel for the Indenture Trustee in response to the Reorganization Trustee's motion to authorize signing of the contract, only Article XV, paragraph (D) is in issue (A 87-88).

The contracts which expired on June 1, 1977 were negotiated in 1974 and contained nearly identical language in three of the four paragraphs in Article XV (A 39, 53). Paragraph A in each contract provided that the employer would not, without the consent of the Union, remove or cause to be removed its present plant or plants from the city or cities in which such plant or plants were located during the term of the contract. That provision was carried forward into the new agreement without change (A 73). Paragraph B prohibited the employer from importing, producing, or jobbing foreign buttons unless full employment was enjoyed by the permanent employees of its plants covered by those agreements. Paragraph C contained a warranty from the employer that it would not liquidate its operations at Rochester, Wellsville or Akron, New York during the contract. The second and third paragraphs of Article XV were also brought forward into the new agreement without substantial change (A 74).

The fourth paragraph of Article XV in each contract dealt with the establishment of damages in the event the non-

liquidation or non-removal provisions of the Article were violated by the employer. The prior contracts had provided two methods by which damages would be established. The contract which covered the Rochester and Wellsville plants provided that the employees would receive, in the event of plant closure, an amount equal to the wages the employee would have earned during the remainder of the contract assuming employment for forty hours each week (A 53). The formulation of damages outlined in that paragraph was first included in the 1968 contract which covered all of the three plants.

In 1971, at the request of the company, a separate agreement was negotiated for the Akron plant. The method of computing severance pay in that contract was carried forward without change in the 1974 agreement and provided:

D. In the event that operations in the Employer's Akron, New York plant are liquidated during the term of this Agreement for economic reasons resulting from the decline of casein and/or through products, the Employer covenants and agrees to offer all permanent employees of the Employer employed at its Akron plant immediate employment in the Employer's Rochester or Wellsville plants. Should any permanent employee of the Employer employed at Employer's Akron plant elect not to transfer to the Employer's Rochester or Wellsville plant as provided for herein, then and in that event the Employer covenants and agrees to pay severance pay to any such employee, the amount of such severance pay to be negotiated and mutually agreed upon between the Employer and the Union. In the event that the Employer and the Union are unable to mutually agree upon the amount of severance pay shall be determined by the arbitrator named in Article XIX of this Agreement and the determination of the arbitrator shall be final and binding. (A 39)

Although counsel for appellant Indenture Trustee argues that "there is no provision for the amount of severance pay to be

negotiated by Rochester and the Union or referred to an arbitrator" (Brief of Indenture Trustee, p 19) the above-quoted paragraph established such a method of computing severance pay in 1971.

The language of Article XV (D) in the new agreement clearly is the amalgam of the two prior provisions. During the first half of the contract, liquidation would give rise to damages equal the employee's pay during the balance of the contract. If liquidation occurred during the latter half of the contract, the amount of severance pay is to be set by negotiations or, if the parties cannot agree, by an arbitrator.

In light of the obligation of the Reorganization Trustee to negotiate about the severance pay provision, the District Court acted properly in affirming the result of those negotiations. The Counter Order proposed by counsel for the Indenture Trustee (A 87) was not an option open to the Court. When faced with the choice of accepting or rejecting the contract as a whole, the Court adopted the position of the Securities and Exchange Commission as shown in an exchange between counsel for the SEC and the Court:

Mr. Aschenbrenner: Your Honor, the position of the Securities & Exchange Commission is that we have no objection to the application as it is submitted, and we would only like to note that we have reviewed the application and it is our feeling that the trustee is both obligated and authorized under the sections of the bankruptcy act, particularly Section 189, to conduct the operation of the business and manage the property of the debtor, and we feel that in that context, while the provision may be subject to controversy, it is an agreement which has been worked out at arm's length and is one which is appropriately within the domain of the trustee.

The Court: It is absolutely astounding to me that the SEC would agree with me, particularly someone whom I did not train myself.

The decision of the District Court recognizes the two principles underlying the collective bargaining relationships in the situation where the employer is operating under the supervision of a bankruptcy court. The first is the obligation of the Trustee to bargain in good faith, discussed above. The second is the authority of a Trustee to enter into a collective bargaining agreement as part of the Trustee's power to employ workers and to conduct the business of the debtor. *In re Wil-Low Cafeterias, Inc.*, 111 F.2d 429 (2d Cir. 1940).

In *Wil-Low Cafeterias, supra*, this Court approved a claim for vacation pay filed by an employee of the debtor in possession. The employee's claim was founded on a provision of a collective bargaining agreement negotiated between the debtor in possession and the employee's union. The parties had negotiated a contract prior to the commencement of the bankruptcy proceedings. During reorganization, the parties negotiated a successor agreement which included a provision for one week of vacation with pay. That contract was never submitted to the bankruptcy court for approval. The question before the appeals court was whether the debtor in possession could obligate the bankrupt estate to pay vacation benefits without having the contract approved by the bankruptcy court. This Court ruled that the debtor in possession's authority to operate the business and employ workers included the power to enter into a collective bargaining agreement.

The contract in question here provided for approval by the bankruptcy court (A 85). That provision does not alter the power of the Reorganization Trustee to enter into this contract nor does it excuse the District Court's obligation to approve a collective bargaining agreement negotiated in good faith.

POINT II

A proper balancing of the policies of the policies underlying the Bankruptcy Act and the National Labor Relations Act requires approval of the contract in question here.

This Court has, during recent years, dealt squarely with the need to balance the rights of employees under the National Labor Relations Act, 29 U.S.C. 141 et seq., and the purposes of Chapters X and XI of the Bankruptcy Act, 11 U.S.C. §§501-676 and 11 U.S.C. §§701-799. *Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc.*, 519 F.2d 698 (2d Cir. 1975), *Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO v. REA Express, Inc.*, 523 F.2d 164 (2d Cir. 1975) cert. denied, 423 U.S. 1017 (1975) (hereinafter referred to as "*BRAC V. REA Express, Inc.*"), *Truck Drivers Local Union No. 807, IBT v. The Bohack Corporation*, 541 F.2d 312 (2d Cir. 1976).

In *Kevin Steel*, *supra*, and *BRAC v. REA Express, Inc.*, *supra*, this Court held that a bankruptcy court had the power to reject an unexpired collective bargaining contract where it could be shown that to continue the contract in question would render reorganization impossible. In each of those cases, though, this Court reaffirmed the Trustee's obligation to bargain with the union concerning changes in the agreements. *Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc.*, 519 F.2d at 706, *BRAC v. REA Express Inc.*, 523 F.2d at 170.

The instant case presents the issue of the extent to which the *Kevin Steel* doctrine applies to a contract negotiated by the trustee and presented to the bankruptcy court for approval. Unlike *Kevin Steel* and its progeny, the Reorganization Trustee and the Union here both seek approval of the contract. The decision of the Reorganization Trustee to support the terms of the agreement must be given the broadest latitude by the bankruptcy court if collective bargaining is to exist in the bankruptcy setting.

The Reorganization Trustee was following the direction of the federal labor statutes and the mandates of this Court when he negotiated the contract. The requirement of negotiation connotes that the resulting agreement will contain provisions which one side or the other would have preferred to avoid. Neither side may dictate the terms of the new contract nor may either side refuse to bargain on a mandatory subject of bargaining. Unless the Reorganization Trustee is granted the power to negotiate and reach agreement with the Union, the rights of the employees to bargain are a sham.

The goal of the Reorganization Trustee is to assure labor peace while providing the corporation the ability to effect reorganization. Each of those goals must be met if reorganization is to succeed. As the Third Circuit has noted.

The court knew, too, that good labor conditions under the contract constituted a valuable asset, and a necessary one to any possible reorganization or sale of the Ledger as a going concern. *In re Public Ledger*, 161 F.2d 762, 767 (3d Cir. 1947).

This Court, likewise, noted, in *Kevin Steel, supra*, that:

In a Chapter X or XI which is designed to preserve a going business, only a hardy — some might say foolhardy — employer would provoke a strike by trying to terminate an existing labor contract. 519 F.2d at 703.

The cases which would allow the Reorganization Trustee to reject an executory contract should not be read as mandating rejection of a contract negotiated by the Trustee where other creditors have objected to a single provision of the agreement. The Reorganization Trustee is not completely happy with the contract that was negotiated and his counsel so informed the District Court (A 128). But the Trustee recognized, though the appellants have not, that the whole contract was the result of give and take on many issues. The position of the

Reorganization Trustee that the contract, on the whole, was beneficial to the company was properly adopted by the District Court.

For this Court to reverse the District Court in this instance would undermine the very essence of the labor policy which the *Kevin Steel* and *REA* cases, *supra*, state must be accommodated with the policies of the Bankruptcy Act. If the Trustee and the Union are required to bargain on the terms and conditions of employment, the agreement reached should only be set aside by the court only where there is a clear showing that the terms negotiated would bring about the immediate collapse of the entity.

The Court should authorize the Trustee to implement a collective bargaining agreement unless rejection:

. . . clearly appears to be the lesser of two evils and that unless the agreement is rejected the [employer] will collapse and the employees will no longer have their jobs. *BRAC v. REA Express, Inc.*, *supra*, at .

The terms of the contract are fair and reasonable. Counsel for the secured bank lenders noted, in oral argument below, that the wage increases were "commensurate with the cost of living" (A 124). Certainly, this is a status quo contract. The Union did not seek to loot the company during reorganization but rather negotiated an agreement which would allow the management to operate without undue interference. In return, the Union secured a continuation of the company's promise, given years before, to continue its operations in Upstate New York and a continuation of an agreed method of setting damages for the breach of that promise.

The Reorganization Trustee determined, and the District Court agreed, that the contract would allow the company to be reorganized. This Court should not reverse that determination.

POINT III

Appellants did not raise before the District Court any genuine issues of material fact requiring an evidentiary hearing.

Counsel for each of the appellants rely heavily in this appeal on the failure of the District Court to hold an evidentiary hearing.¹

Neither appellant, though, clearly delineates the issues of material fact to be resolved nor do the appellants demonstrate that the District Court's decision would be clearly erroneous were certain facts developed at an evidentiary hearing.

Counsel for the Indenture Trustee properly classifies the proceedings below as being within the summary jurisdiction of the District Court. See, generally, 2 *Collier on Bankruptcy*, ¶23.02 at pp. 438 et seq. Being a summary proceeding, there is no requirement for an evidentiary hearing unless there exists a genuine issue as to a material fact. Rule 56, Federal Rules of Civil Procedure, 6 PT. 2 *Moore's Federal Practice*, ¶56.17 [7].

The appellants raised several points in their papers to the Court below which they argued were the evils inherent in authorizing the contract. Each of the issues was an argument against approving the contract, not an issue of fact to be resolved by the Court. The Court was free to exercise its discretion based on the undisputed facts after hearing the arguments of both sides.

Rule 52, Federal Rules of Civil Procedure, relied on by the appellant Indenture Trustee, is not applicable on the present case. Rule 52, by its terms, makes finding of facts and conclusions of law unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b). Rule 41 (b), relating to involuntary dismissal of actions, is clearly not relevant here.

¹Brief of appellant Indenture Trustee, pages 11-19, brief of appellants, Secured Bank Lenders, pages 7-11.

Each and every argument presented by the appellants against the adoption of this contract was presented to the District Court. The District Court heard each side prior to granting the Reorganization Trustee authority to sign the collective bargaining agreement. It was only at that point of the hearing, after the Court had given its ruling, did counsel for appellants seek an opportunity to call a witness from the Union for testimony (A 129). The arguments presented concerning the need for testimony seem to be little more than afterthoughts of the appellants.

A review of the papers submitted by the appellants to the District Court prior to the hearing can reduce the position of the appellants to four basic arguments:

- (1) The adoption of the contract would jeopardize the reorganization plan and would negatively impact on Duplan (A 91).
- (2) Duplan did not have sufficient available funds to cover the contingent liability created (A 91).
- (3) The secured creditors were already at a disadvantage because of a shortfall in collateral for the secured debt which would be increased by the potential administration expense arising out of the severance pay provision (A 102), and
- (4) The provisions of Article XV (D) were to be applied solely in the event of a runaway shop (A 105).

All of the parties were heard and appellants were given ample opportunity to present the four points above. None of the points listed above would require an evidentiary hearing for resolution by the Court.

The first point raised, which in fact is the essence of the current appeal, is that the severance pay language creates a potential liability which jeopardizes the reorganization of Duplan. This is no more than the restatement of the standard which the Court was to apply. Opposed to the claim that the

severance pay language would jeopardize reorganization, the Court had a statement from the Reorganization Trustee that the Union insisted on the provision in question and had indicated at each negotiation that the Union would strike if the severance pay language was excluded. (A 128). A strike quite simply would destroy the Rochester operations. The District Court was required to decide between those two positions. There is no credibility to be resolved here. These were the two equities which the Court was required to balance.

While the claim of appellant Indenture Trustee concerning the unavailability of funds to meet the potential administration claim (A 91) raised a factual question, the Court was hardly required to hold a hearing on that matter. The hearing below was certainly not before a District Court unfamiliar with the conditions of Duplan. The Court below, as the Chapter X Bankruptcy Court supervising the reorganization, was fully aware of the economic status of the corporation. The Court possesses a knowledge of the corporation's reorganization which the appellants fail to credit in this appeal. In response to the claim by counsel for the Secured Bank Lenders of insufficient funds, the Court noted that Duplan presently had in the bank sufficient cash to pay any such potential liability (A 132). Likewise, the claim of the appellants that there exists a shortfall between the collateral goes to the proper exercise of the Court's discretion, not to the need for an evidentiary hearing.

Finally, the item of dispute on which counsel for the appellants consistently demanded a hearing, whether the language of the severance pay clause was to apply only in the event of a runaway shop is frivolous. Immediately after the District Court granted the Reorganization Trustee's motion to affirm the contract, counsel for the Secured Bank Lenders demanded an opportunity to examine a representative of the Union (A 129-130). The purpose of that examination was to determine whether or not the language of Article XV (D) applied only to a

runaway shop or would apply in any liquidation as noted above, Article XV contains four paragraphs. Paragraph A relates to an agreement by the employer not to relocate the plant outside the cities in which they presently existed (the runaway shop clause). Paragraph C consists of a warranty by the employer not to liquidate its operations in any of the three plants covered by the contracts (liquidation clause). Neither Paragraphs A nor C are challenged by appellants. Clearly then, the Court has adequate justification to a ruling that the clear language of the contract applied the severance pay language both in the event of a liquidation and a runaway shop and that a hearing on the issue is not necessary.

Certainly, the District Court was under no obligation to engage in the exercise in futility of having an evidentiary hearing where there existed no genuine issue of material fact. Appellees do not contend that there were not serious considerations presented to the Court as to the wisdom of adopting the contract. The appellees point out that those considerations were not evidentiary considerations. The Court below properly exercised its discretion and was not required, pursuant to Rule 52, Federal Rules of Civil Procedure to make findings of facts or conclusions of law. The District Court was authorized to rule from the bench that the benefits to the Reorganization Trustee received from forty months of labor peace at the Rochester plants outweighed the potential liability which the Trustee was required to undertake in order to sustain that labor peace.

CONCLUSION

The Order of the District Court authorizing the Reorganization Trustee to implement the collective bargaining agreement negotiated with the Union should be affirmed.

Respectfully submitted,

**CHAMBERLAIN, D'AMANDA, BAUMAN,
CHATMAN & OPPENHEIMER**

*Attorneys for the Rochester Joint
Board, Amalgamated Clothing and
Textile Workers Union, AFL-CIO,
1100 Crossroads Office Building
2 State Street
Rochester, New York 14614
(716) 232-3730*

Michael T. Harren
of Counsel



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The Daily Record

February 1, 1978

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Lonn A. Trost, Esq.
Shea, Gould, Climenko & Casey
330 Madison Avenue
New York, New York 10017

John P. Campbell, Esq.
Curtis, Mallet-Prevost, Colt
& Mosle
100 Wall Street
New York, New York 10007

Richard S. Toder, Esq.
Zalkin, Rodin & Goodman
750 Third Avenue
New York, New York 10017

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